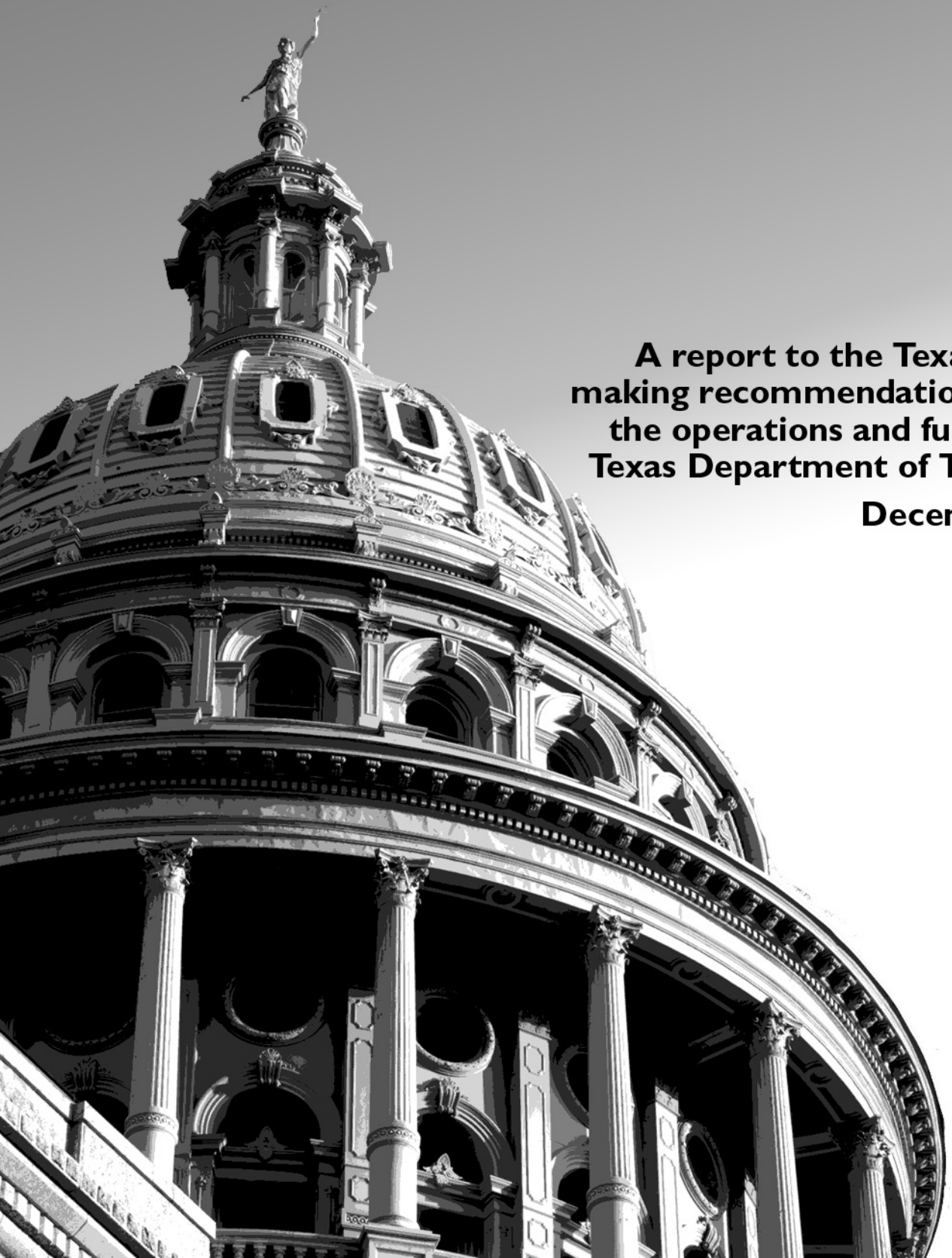
TEXAS TRANSPORTATION COMMISSION

Mobility Challenges & Solutions 79th Texas Legislative Session



A report to the Texas Legislature making recommendations to enhance the operations and functions of the Texas Department of Transportation

December 16, 2004

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INTRODUCTION

SB 409 from the 78th Texas Legislature provided the Chairman of the Texas Transportation Commission (commission) the authority to issue a report to the legislature on recommendations pertaining to the operations of the Texas Department of Transportation (TxDOT). This provision was codified as Transportation Code, Section 201.0545 and reads specifically as follows:

> *§ 201.0545. RECOMMENDATIONS TO LEGISLATURE.*
>
> *(a) The commission shall consider ways in which the department's operations may be improved and may periodically report to the legislature concerning potential statutory changes that would improve the operation of the department.*
>
> *(b) On behalf of the commission, the chair shall report to the governor, the lieutenant governor, the speaker of the house of representatives, and the presiding officers of relevant legislative committees on legislative recommendations adopted by the commission and relating to the operation of the department.*

The commission undertook an effort to develop ideas and concepts from three main sources: the commission itself; sources outside the agency, including the legislature; and from within the ranks of the department. This process began early in 2004 and included successive discussion items during commission meetings from August through December 2004.

Contained in this report is a brief overview of the transportation issues the commission recommends that the 79th Texas Legislature consider. In a broad sense, the report is divided into two main categories. The first is funding and significant policy-related issues. The second category includes issues that are more routine or operational in nature. With each issue contained in this report, the reader will find a brief analysis of pertinent background on the subject followed by the recommendation.

In the most recent regular session, the legislature enacted sweeping changes to the fundamental laws which govern transportation financing and development. These changes were embodied in HB 3588, authored by Representative Mike Krusee and Senator Steve Ogden. Many of the more significant recommendations contained in this report center on suggestions for improving critical components of HB 3588.

Questions regarding this report should be directed to Coby Chase (cchase@dot.state.tx.us) or Jefferson Grimes (jgrimes@dot.state.tx.us) in the department's Legislative Affairs Office at 512-463-6086 or in writing at 125 East 11th Street, Austin, Texas 78701.

THE STATE OF TRANSPORTATION TODAY

Every year, people in Texas spend more and more time sitting in traffic. Drivers leave home earlier and get home later. Texas roadways have become increasingly congested in recent years due in part to phenomenal population growth and a changing economy.

The number of people living in Texas increased by some eight million people between 1980 and 2003. The number of vehicles shot up too – from 11.7 million to 18.9 million – a 61 percent jump. But, the amount of roadway to drive on increased only 7.6 percent.

Even more people are on the way. Some forecasts predict Texas' population will increase from 22 million to as many as 36 million people in only about 20 years. In addition, studies show that twice as many miles are driven now than 25 years ago.

A changing economic base also led to increased traffic. The Texas economy, once tied to the oil and gas industry, became more diversified. High-technology, chemical, and pharmaceutical industries flourished. And robust trade developed with Mexico following the North American Free Trade Agreement. This growth brings huge economic advantages, but also puts tremendous strain on state highways. All in all, increased use is tearing up the state's roadways. Unless Texas identifies and implements solutions, traffic delays will get longer.

Heavy traffic costs more than just time. Transportation networks are the backbone of any economy. If these transportation networks break down and cease to function, the entire economy will suffer. The ability to have goods delivered "on time, every time" is critical to the success of many industries. A few large employers in Texas have indicated that transportation congestion has been a factor in deciding to open a new facility out of Texas. When the movement of goods and services is delayed, productivity can go down and consumer costs can go up. Jobs can be on the line.

This incredible demand for transportation has a domino effect. As congestion increases in major cities, small towns are also affected by increased delays in the movement of goods and services. Everyone pays the price for congestion. Texas must decide how to fix this problem. But first, how will the state pay for a solution?

Since the 1920s, Texas has paid for road construction and maintenance primarily with revenue generated by the gasoline tax. The current gas tax in Texas is 38.4 cents per gallon – an 18.4 cent federal tax and a 20 cent state tax.

The federal tax helps pay for highway projects across the United States. For every dollar that Texas sends to Washington, D. C., only about 85 cents comes back to Texas. The rest, representing billions of Texas dollars, is put into roads in other states. Even if Texas received the entire dollar, it would still fall short of meeting the state's needs.

The state gas tax supports transportation projects strictly in Texas, but less than three-quarters of the state's gas tax goes toward highway projects. Nearly one-fourth is for public education. The money that does go to the state highway fund pays for highway planning and design, acquisition of right of way, initial road construction, ongoing maintenance and the Department of Public Safety.

For most of the twentieth century, the method of paying for highways with gas tax revenues (and motor vehicle registration fees) worked well. But today, revenue brought in by the gas tax falls short of transportation demands.

The monetary cost for maintaining and rehabilitating existing roadways now actually costs more than the entire state gasoline tax brings in. It is difficult to stay even, much less prepare for more cars on the road every year, a growing population, growing industry, and the ever-growing number of trucks.

Drivers now travel more miles but use less fuel because of more fuel-efficient vehicles. The most recent data show that a passenger car on average used 209 gallons less in 2002 than in 1970 and a light truck on average used 221 gallons less. As cars travel more miles using less fuel, gas tax revenues shrink in proportion to the cost of increased wear on roadways.

One possible way to fund transportation projects is to raise the state gas tax rate – which has not been raised since 1991. If the state gas tax is increased by a nickel per gallon, it would result in drivers throughout Texas contributing some five hundred million additional dollars per year for transportation projects. This may sound like a lot, but it would be only enough money to pay for the construction cost of, more or less, two major highway interchanges.

To meet current statewide transportation needs, the state gas tax would have to increase by about one dollar per gallon. Add on the federal tax and the cost of gas itself, and the cost to drivers would be exorbitant. Rising fuel standards, increasing demand for hybrid-powered vehicles and other new technologies may render the gasoline tax obsolete. The gas tax is simply not a reliable source of revenue for the future.

Texas has reached a crisis situation where alternative funding options must be considered. Current funding mechanisms are not working. They are not generating enough revenue to do what must be done to move the state's economy forward. Different ways of funding projects must be identified and developed in order to begin to build the state out of its present dilemma.

Realistically, the revenue from one source alone will not cover the cost of needed maintenance and construction. The solution must include a combination of strategies:

- building and expanding the highway system using innovative financing and private sector involvement;
- implementing ways to better manage access on and off highways; and
- other multi-modal solutions which coordinate highway, rail and public transit strategies.

Unless this potentially crippling transportation problem is fixed soon, people will spend more time sitting in cars. They will spend more time away from work and home. Maintenance and construction costs will continue to skyrocket and the economy will take an even bigger hit. When anyone sits in traffic, families lose, employers lose, and all of Texas loses. Texans must pull together to make sure the state has a safe, reliable and efficient transportation system – not only for the near future, but for generations to come.

HB 3588 REVISIONS

HB 3588 was an historic and substantial transportation bill that passed during the 78th Regular Session. HB 2 from the 3rd Called Special Session of the 78th Legislature made some minor revisions to the bill. Throughout implementation of the provisions contained in these bills, several issues have been identified that need to be revised or clarified. These are divided here into four broad categories of issues: 1) revenue/funding; 2) rail; 3) comprehensive development agreements; and 4) miscellaneous.

REVENUE/FUNDING ISSUES

TOLL EQUITY

Background Toll equity helps stretch limited state tax dollars by allowing state highway funds to be combined with other funds to build toll roads, without requiring repayment of state highway funds. This combination of funds makes toll roads more feasible since the entire cost of the project does not have to be repaid with tolls. Current law limits TxDOT's annual financial participation in toll facilities to $800 million each fiscal year. Section 222.103, Transportation Code establishes the $800 million toll equity cap and does not apply to money required to be repaid (loans). There are concerns that the existing cap on toll equity will severely limit the department's ability to leverage limited state highway funding by financing toll projects.

Proposed Remedy Repeal the cap on toll equity grants.

PASS-THROUGH TOLL AGREEMENTS

Background Current law allows a public or private entity to construct state highway projects and be repaid by TxDOT. A pass-through toll is defined in statute as a per vehicle fee or a per vehicle-mile fee that is determined by the number of vehicles using a facility. A pass-through toll agreement can be used on a non-tolled or tolled roadway. By department rule, several factors are considered in order for a pass-through toll agreement to be authorized. These include the financial benefits to the state, local public support for the project, whether the project is in the department's Unified Transportation Program, the extent to which the project will relieve congestion on the state highway system, the potential benefits to regional air quality that may be derived from the project, compatibility of the proposed project with existing and planned facilities, and the entity's experience in developing highway projects. Current law does not allow TxDOT to enter into a pass-through toll agreement under which the department constructs the project and is reimbursed by a public or private entity. Having this authority would be beneficial in certain cases, such as where the public entity may not have the experience in road construction or has a lack of funding.

Proposed Remedy Authorize the department to construct a state highway project and be reimbursed by a public or private entity under a pass-through toll agreement.

TOLL REVENUE

Background Current law ensures that toll revenues from bonded projects go into the State Highway Fund. However, there will be instances where a toll project will be funded through means other than through

bonds, such as through 100 percent Fund 6 or perhaps the Texas Mobility Fund. The statute needs to be revised to cover these types of toll projects so that the revenue can go back into Fund 6 for transportation projects in the region.

Proposed Remedy Ensure toll revenue from any department turnpike project, whether funded with bond proceeds or not, is deposited into Fund 6 and may be spent by the department on transportation projects in the region.

SURPLUS TOLL REVENUE

Background HB 3588 provided that any surplus toll revenue from a department turnpike project (revenue above what is used for debt, operations and maintenance), can only be used to pay the costs of another turnpike project in the region. This means that a project in the area such as a rail project or an air quality project could not be funded with the surplus toll revenue. It would be beneficial to allow surplus toll revenue to be used on non-turnpike projects within the same geographical area, particularly since it would still benefit the region and provide for efficiencies within the regional transportation system.

Proposed Remedy Authorize the department to spend surplus toll revenue on non-toll highway transportation projects.

RAIL ISSUES

CAP ON RAIL EXPENDITURES

Background Current law provides a cap on rail expenditures, with certain exceptions, at $12.5 million on rail facilities that are not abandoned rail facilities or facilities that are not a part of the Trans-Texas Corridor. As the state heads further into the business of providing a truly multi-modal transportation network, this cap can be counterproductive and can severely limit the department's ability to utilize rail facilities to reduce freight movements on the state highway system. In addition, current law limits the department's financial participation in the Trans-Texas Corridor, placing a $25 million cap on non-highway facilities. Rail would be considered a non-highway facility. Rail is a capital intensive industry. TxDOT has identified actual present needs on state-owned rail facilities that far exceed $45 million.

Proposed Remedy Repeal the cap on department expenditures for rail facilities found in Transportation Code, Chapters 91 and 227.

CONTRACTING AUTHORITY FOR RAIL

Background The statute requires that a contract for the construction, maintenance, or operation of a rail facility must be let by a competitive bidding procedure and awarded to the lowest responsible bidder that complies with the department's criteria. However, certain circumstances may exist where the low bid procedure may not be the best method. For instance, in a situation where a rail facility is acquired by TxDOT and then leased, the low bid process does not allow for consideration of the compensation it might obtain from the lessee. State law should be clarified to ensure that the state receives the best value when contracting or leasing.

Proposed Remedy Clarify the department's authority to enter into contracts on other than a low bid basis, with governmental entities to construct, maintain, and operate rail facilities; and with public and private entities to lease rail facilities.

COMPREHENSIVE DEVELOPMENT AGREEMENTS

CDAs ON NON-TOLL PROJECTS

Background CDAs can currently be used for turnpike projects and for Trans-Texas Corridor projects. A CDA is an innovative project-delivery method that rolls the design, acquisition, finance, construction, maintenance, or operation of turnpike projects into one contract. Under current law, CDAs cannot be used on non-toll or non-Trans-Texas Corridor projects. It would be beneficial for TxDOT to have the ability to use CDAs on a non-toll project. It would provide flexibility to the department and could help to speed up project delivery on certain projects.

Proposed Remedy Authorize the department to enter into comprehensive development agreements for projects in addition to turnpike projects and Trans-Texas Corridor projects.

GREATER AUTHORITY TO NEGOTIATE CDAS

Background Under current law, TxDOT is limited in its authority to negotiate with its contractor of first choice for the purposes of entering into a CDA. Current law allows TxDOT to enter into discussions, not negotiations, regarding 1) the incorporation of aspects of other proposals for the purpose of achieving the overall best value for the department, 2) clarifications and minor adjustments in scheduling, cash flow, and similar items, and 3) matters that have arisen since the submission of the proposal. Greater negotiating authority would ensure that the state receives the best value.

Proposed Remedy Provide the department with broader authority to negotiate the terms of a comprehensive development agreement with its contractor of first choice.

REPEAL REQUIREMENT FOR FINANCIAL PLAN DURING RFQ FOR CDAS

Background Current law requires a private entity to include a financial plan in its proposal in order for the department to be able to accept an unsolicited proposal. The financial plan must include projected costs and proposed sources of funds. This information is required much too early in the process. As a result, the plan is purely conceptual at the time it is submitted. In addition, it is burdensome and an inefficient use of the preparer's time which may deter qualified entities from submitting proposals. The requirement for submission of a financial plan during the RFQ for CDAs should be repealed and made optional. Detailed financial plans or pricing should be obtained in the detailed proposals requested in the second step of the CDA procurement process.

Proposed Remedy Repeal the provision requiring a request for qualifications response relating to a project developed under a comprehensive development agreement to include a proposed financial plan and make it optional at this point. Add the requirement for a thorough financial plan in the detailed proposal.

REMOVE EXPIRATION DATE FOR CDAS

Background Under current law, TxDOT's authority to enter into CDAs will expire on August 31, 2011. Since many toll roads throughout the state are just now being analyzed for preliminary feasibility, the expiration date would limit the use of this valuable tool. This could particularly be detrimental to the Trans-Texas Corridor since only the "umbrella" CDA for the TTC-35 element is currently in the works. Many more CDAs will need to be entered into further down the road for other portions of the TTC.

Proposed Remedy Remove the expiration date for CDAs.

MISCELLANEOUS ISSUE

ENVIRONMENTAL MITIGATION FOR THE TRANS-TEXAS CORRIDOR

Background Because of an oversight in drafting the legislation, TxDOT is restricted on where it can buy land for environmental mitigation purposes for the Trans-Texas Corridor. HB 3588 restricted land purchases for the Trans-Texas corridor to the corridor itself, or areas contiguous to an existing or planned segment of the corridor. This provision inadvertently excluded land for environmental mitigation purposes. As the law is currently written, TxDOT is not able to buy land for mitigation purposes that is not contiguous to the corridor. Purchasing both project and environmental impact land adjacent to the corridor would result in a greater impact to the corridor area and possibly greater expense. In addition, the practice of purchasing non-contiguous land for environmental mitigation purposes is common practice for other non-corridor projects.

Proposed Remedy Authorize TxDOT to acquire real property necessary to mitigate adverse environmental effects of the Trans-Texas Corridor, even if the property is not located in or contiguous to a segment of the Trans-Texas Corridor.

REGIONAL MOBILITY AUTHORITIES

Background HB 3588 enacted by the 78th Texas Legislature conferred substantial new powers on Regional Mobility Authorities (RMAs). RMAs have the power of eminent domain, may issue revenue bonds, and may enter into comprehensive development agreements. The statute authorizes RMAs to develop the following types of projects:

Toll or non-toll highways
Freight rail facilities
Passenger rail facilities
Ferries
Airports
Pedestrian or bicycle facilities
Intermodal hubs
Border crossing inspection stations (with less than 900,000 crossings in FY 02)
Air quality improvement initiatives
Projects listed in state implementation plan

RMAs were created to help improve mobility by building needed projects more quickly than traditional funding sources allow. RMAs provide more local control in deciding how to address the transportation needs of their regions. Some projects that they undertake can also generate revenue to build additional transportation projects.

However, state law does not allow RMAs to involve themselves in developing public transportation systems in their area. State law should be amended in order to allow RMAs the ability to fully address all modes of transportation.

Proposed Remedy Amend Transportation Code, Chapter 370 governing the establishment and general powers of RMAs to include all forms of public transportation services. This proposal would allow RMAs to integrate all of their region's strategies to improve mobility, including transit, under the oversight of one authority.

Under this proposal, an RMA could not enter into the service area of an existing transit provider that has implemented taxing authority for that purpose. However, an RMA that wishes to provide transit services in an area that is already served by such a provider may enter into an agreement with the governing body of that provider to transfer its operations to the RMA. It would be a voluntary arrangement.

If this authority is exercised, the RMA would be able to offer seamless service that eliminates the current patchwork of providers that currently exists in some regions of the state. These public transportation services would be planned and operated in conjunction with the region's overall strategy to reduce congestion.

Additionally, amend Transportation Code, Chapter 366 to allow Regional Tollway Authorities to convert to an RMA. And amend Transportation Code, Chapter 284 to allow county tolling authorities to transfer their facilities and projects to an RMA. The effect of these provisions would be to allow regions of the state, on a voluntary basis, the opportunity to offer multimodal solutions to the mobility problems they face. A tolling authority may find that it is more effective in reducing congestion if they can plan projects that include freight rail, passenger rail, transit, or any other activity in which RMAs are authorized to engage.

ADVANCE ACQUISITION

Background Currently TxDOT can acquire right-of-way in advance of final environmental clearance on a parcel-by-parcel basis through a hardship purchase or a protective buy. A hardship purchase is to alleviate hardship to property owners who would otherwise be unable to sell their property as a result of the transportation project. A protective purchase would be justified to prevent *imminent* development and the resulting appreciation of a parcel which would tend to limit the choice of highway alternatives.

In certain instances the need arises for the department to acquire real property that does not fall under either of these exceptions prior to the completion of the environmental, design, and public involvement processes. HB 3588 enacted by the 78th Texas Legislature authorizes the department to acquire options to purchase property. An "option to purchase" or "option contract" is an agreement by which the owner of property gives the department the privilege or right to purchase the property at a fixed price (or at a price to be determined at a later time), on specified terms, and within the time specified in the contract. The owner does not sell the property, but sells the right to buy, at the option of the department.

However, because it is difficult to reach an agreement on the future value of property, option contracts are not likely to specify the purchase price should the department exercise the option.

Flexibility to begin acquiring an interest (not just an option) in real property early could greatly enhance the timeliness of project delivery. Once property has been acquired by the state, it would also help local governments plan development in these areas in accordance with the planned facility.

The commission is aware that early acquisition is not appropriate for every project. Because advance acquisition does involve a degree of risk to the department, TxDOT policy would limit the circumstances under which real property can be acquired prior to environmental clearance.

Proposed Remedy Amend Transportation Code, Section 202.112 to authorize the commission to purchase an interest in real property that is identified for possible use in or in connection with a transportation facility, before a final decision has been made on the precise alignment of the complete facility.

Advance acquisition would not be appropriate for every project. However there are circumstances when the department could demonstrate the need for acquiring real property prior to the completion of the environmental and public involvement processes.

LOCAL TRANSPORTATION PLANNING AUTHORITY

Background Local governments are tasked with ensuring the safety, health, and well being of the general public. Toward this end they have certain powers to require that adequate streets, drainage facilities, and sewage facilities are provided in subdivisions. These powers, which are limited in the case of counties and extensive in the case of cities, are carried out by requiring and reviewing subdivision plats.

A subdivision plat is a survey, prepared by a licensed registered surveyor, of property describing the dimensions and location of lot lines, streets, and easements. A plat also establishes the lot, block, and subdivision name used in real estate transactions. State law requires property owners who divide a tract into two or more parts for the purpose of laying out any subdivision of a tract of land to file a plat and have it approved by the appropriate body. In an unincorporated area, that body is the county (Local Government Code, Chapter 232). In an incorporated area, it is a city (Local Government Code, Chapter 212). If it is in the unincorporated part of a city (extra-territorial jurisdiction), the law intends that one body provides the review under an agreement between the county and cities (Local Government Code, Chapter 242).

Plats in unincorporated areas or extra-territorial jurisdictions may be denied if they fail to meet local rules regarding the provision of adequate streets, drainage, and sewage. Statute prohibits regulation (and therefore denial of a subdivision) on the basis of land use, buildings, or the number of residences.

Plats in incorporated areas must be approved unless they do not conform to a city's current and future plans for roads, streets, public highways, and public utilities (Local Government Code, Section 212.010). Cities with limited-purpose annexation are expressly prohibited from denying plats based solely on their effect on traffic or traffic operations (Local Government Code, Section 212.103).

Cities have 30 days to review a plat; if no action has been taken in that time, the plat is considered approved. Counties have 60 days to act on a plat application.

Certain counties have additional authority to regulate lot frontages and setbacks along major thoroughfares, but no instance of that authority having been exercised has been identified (Local Government Code, Section 232.101 et seq.). It appears that this language was added in the 77th Legislature as a result of a tradeoff – builders were relieved of having to comply with both municipal and county development regulations in an ETJ (HB 1445), and counties received some subdivision regulatory powers already available to cities (SB 873).

Routes are first identified, then subjected to a review process in accordance with federal requirements, primarily the National Environmental Policy Act (NEPA). The problem arises when a route is identified and affected land is subsequently subdivided. Whether done speculatively or not, the end result is excessive costs to the state for land acquisition, additional costs or safety issues related to access, and new landowners who may not be aware of the upcoming transportation project.

Quantitative data is not readily available. TxDOT does not maintain average land price information and does not finalize routes before a Record of Decision under the National Environmental Policy Act is received. As a result, obtaining "before and after" comparisons of land prices is challenging. However, instances are cited where significant costs were incurred, and such instances are expected to multiply with the development of the Trans-Texas Corridor.

Proposed Remedy In order to ensure good communication between the state and the county, require counties to file with the department copies of plats that have been filed with the county for land located within a future transportation corridor identified in a major thoroughfare plan of the county or the metropolitan planning organization of the region. And require the dedication of land for use as a state highway in accordance with the plan.

Preservation of the transportation corridor could discourage speculators from running up the cost of land to the state. It also will reduce the instances when someone purchases a lot or a home not knowing that a highway project is planned. Applying the law statewide would prevent developers from moving to another county in order to avoid county-specific regulations and requirements.

RAIL RELOCATION

Background There are two factors at work that demonstrate the need to increase the level of freight rail investment in Texas.

First, highway capacity is not keeping up with the demand. Texas roadways have become increasingly congested in recent years due in part to phenomenal population growth and a changing economy. The number of people living in Texas increased by nearly eight million between 1980 and 2003. Some forecasts predict the Texas population will increase from 22 million to as many as 36 million people over the next twenty years.

From 1980 to 2003, the number of vehicles increased from 11.7 million to 18.9 million – a 61 percent increase. And twice as many miles are driven now than twenty-five years ago. Meanwhile, the amount of roadway to drive on increased only about 7.6 percent over the same time period.

Second, the state's changing economic base has put a tremendous strain on highways over the years, and we can expect more of the same in coming decades. According to the American Association of State Highway and Transportation Officials, by 2020 domestic freight tonnage in the United States will increase by 57 percent and import-export tonnage will increase by nearly 100 percent. The highway system in the United States must carry an additional 6.6 billion tons of freight (an increase of 62 percent), and the freight rail system must carry an additional 888 million tons (an increase of 44 percent). Because of the North American Free Trade Agreement and the state's proximity to Mexico, much of this freight will be carried through Texas.

The railroad industry was deregulated in 1980. As a result, the industry dramatically improved its productivity and stabilized its market share. However, this was accomplished by downsizing and streamlining operations and keeping capital expenditures low. The industry does not generate sufficient profits to reinvest in the infrastructure. As the demand for freight transportation increases, the rail industry's infrastructure will not be sufficient to maintain its market share and keep freight off the highways.

There are many public benefits associated with a robust freight rail network. As demonstrated above, freight rail could have a significant positive impact on the level of congestion on state highways. But there are other benefits. Railroads are more fuel-efficient and emit fewer pollutants per ton-mile than trucks. The safety record of the rail industry versus the trucking industry indicates it is safer to move hazardous material by rail. And the nation's defense installations depend on rail when mobilizing forces, equipment, and supplies.

Additionally, many Texas cities are considering the development of commuter rail to assist with their congestion and air quality problems. As their planning has progressed, they have realized that improvements to their existing regional rail freight systems are the key to freeing up underutilized lines for passenger projects.

The existing rail right-of-way, if not used for commuter rail, could be converted to right of way for highway purposes. This is particularly valuable real estate in congested metropolitan areas that frequently lack the space to expand their existing infrastructure.

Proposed Remedy A rail relocation and improvement fund could leverage its assets to issue bonds. The department estimates that $100 million per year could generate $1 billion in bond proceeds to be used for the relocation or improvement of rail lines. In some instances, the costs of the projects could be offset somewhat by the acquisition of the existing right of way (in the case of relocated lines) and the potential for

increased economic development along these corridors. Also, savings could be generated by the availability of highway funds that otherwise would have been expended on grade-separated rail crossings, safety improvements, and right of way expenses for highway improvements.

A dedicated revenue stream into a rail relocation fund could then be leveraged to generate a substantial level of bond proceeds. The department should have authorization to use public funds for these purposes. The current authority of the department to construct, acquire, and operate rail (Transportation Code Chapter 91) does not provide sufficient authority to contribute public funds toward the relocation or improvement of privately owned rail lines. A constitutional amendment would also be required to establish the fund.

STATE-FUNDED LOAN PROGRAMS

Background State Infrastructure Banks (SIBs) are revolving infrastructure investment funds for surface transportation that are established and administered by states. SIBs may be capitalized with regular federal-aid highway apportionments and state funds and can offer a range of flexible financial assistance, including loans and various forms of credit enhancement.

SIBs are a close relative of revolving loan funds, as they can lend money to an initial group of projects and then use the subsequent repayments to fund a future generation of loans. However, SIBs can also provide credit enhancement products (such as lines of credit and payment guarantees) in addition to loans.

Section 350 of the National Highway System Designation Act of 1995 (NHS Act) authorized the use of federal-aid highway funds and federal transit funds to capitalize a revolving loan fund and authorized states to establish SIBs for the purpose of making loans and providing other financial assistance to public and private entities. Thirty-nine states were approved to use federal funds to capitalize SIBs. The Federal Highway Administration considers SIBs to be a very successful tool. As of March 2004, 32 states have entered into 373 loan agreements with a total value of just under $4.8 billion. Forty-four of these agreements, a total value of $258 million, are from Texas' SIB.

However, the Transportation Equity Act for the 21st Century (TEA-21) subsequently allowed only four states (California, Florida, Missouri and Rhode Island) to continue using TEA-21 funds to increase their SIBs.

The Texas Legislature created the Texas SIB in 1997 and the commission approved administrative rules that govern the program in December 1997. The rules became effective in January 1998.

The stated purposes of the Texas SIB are:

- to encourage public and private investment in transportation facilities, including facilities that contribute to the multimodal and intermodal transportation capabilities of the state;
- to expand the availability of funding for transportation projects and reduce direct state costs;
- to maximize private and local participation in financing projects; and
- to improve the efficiency of the state transportation system.

Eligible applicants include any public or private entity authorized by law to construct, maintain, or finance an eligible transportation project. By the provisions of Section 350 of the NHS Act, federal funds in the highway account of a SIB may be used only to provide assistance with respect to construction of federal-aid eligible highways.

Financial assistance may be provided in the form of loans as well as a variety of credit enhancements such as lines of credit, letters of credit, bond issuance, and capital reserves. Loans may be funded from available SIB resources or through the sale of revenue bonds by the commission. The SIB is not authorized to provide grant funding.

Applications to the Texas SIB are accepted on an ongoing basis. Should the commission determine that bank funding is fully committed or other constraints on funding exist, the application acceptance process may be suspended.

Currently, any state that capitalized a SIB with federal funds distributed in federal fiscal years 1996 or 1997 may continue to operate that bank with whatever federal funds have already been deposited in the bank. These states are free also to supplement the initial capitalization with additional state or local funds. When conditions change, the commission can again accept applications.

Candidate projects for SIB assistance include any highway project eligible for federal assistance under Title 23 of the U.S. Code and any transit capital project eligible for federal assistance under Title 49 of the U.S. Code. SIBs can provide financial support to both public and private sponsors of eligible transportation projects, and can assist in financing any stage of the project's development. There are no federal share restrictions on the cost of projects eligible to receive SIB assistance.

Although the federal government gives states discretion to establish most credit terms, the United States Department of Transportation requires that most SIB-assisted projects comply with the regulations that apply to grant-funded projects. All projects that receive "first round" assistance - meaning loans or other credit support that derives from the initial Federal capitalization grants - must comply with these regulations.

For SIBs approved under the NHS Act, projects receiving "second round" assistance are not subject to the standard federal highway or transit requirements, with one exception. If the first-round assistance was repaid with other federal funds, any project receiving second-round assistance derived from those repayments must continue to comply with all federal requirements.

In the department's 2006-2007 Legislative Appropriations Request, TxDOT has requested $40 million for the biennium to capitalize a public transportation loan program. This money would be utilized for capital investments under most circumstances.

Proposed Remedy It is recommended that the legislature enact statutes authorizing the creation of state-funded SIB programs whereby TxDOT may lend state monies to local governments for eligible roadway projects and eligible public transportation projects.

Revolving loan programs exemplified by SIBs are an excellent way to leverage transportation funding. These programs can be capitalized with state highway funds or other designated state funds and paid back with any available funding source. Thus, the state's investment in transportation infrastructure provides immediate economic and congestion reduction benefits, and is replenished through the use of existing or new tools, including pass-through tolls.

This approach is not currently available because state law has not kept up with federal innovations allowing SIBs to be capitalized solely with state funds. TxDOT and transit systems have for a number of years constructed and financed projects solely with state or local funds. This change in law would create another avenue for that method, resulting in moving more projects to fruition more quickly.

TEXAS MOBILITY FUND

Background The Texas Legislature created the Texas Mobility Fund in 2001 and authorized the Commission to issue bonds to finance certain highway and mobility projects. In November 2001, a constitutional amendment was approved by voters thereby creating the Texas Mobility Fund and authorizing the issuance of bonds and other obligations for financing the construction and acquisition of extensions, improvements, and expansions of the state's highways, roads, and other mobility projects. Two years later, the Texas Legislature enacted HB 3588 which created the funding source for the Texas Mobility Fund.

The Texas Mobility Fund provides a new dedicated revenue source to supplement the traditional "pay as you go" method of financing transportation projects. HB 3588 directed existing revenue from motor vehicle inspection fees, driver license fees, and driver record information fees from the General Revenue Fund to the Texas Mobility Fund. However, the revenue will not be slated for the Texas Mobility Fund until FY 2006. Until that time, the revenue collected from DPS fees will be deposited to General Revenue.

Deposits to the fund are expected to support bonds to produce up to $3 billion in new funding. This will allow the commission to accelerate construction and build projects faster. Bonds can be used to pay for construction, reconstruction, expansion, acquiring state highways, including necessary design and right of way acquisition, state participation in publicly owned toll projects and other public transportation projects. The amount of funds available for debt service must be certified by the State Comptroller of Public Accounts.

The Texas Mobility Fund represents a significant source of funding for various types of transportation projects. However, the amount of revenue going into the fund will essentially allow TxDOT to fund $3 billion worth of projects, less than one year's worth of lettings, and then be faced with retiring the debt on those projects over the ensuing 15 years. Additional sources of funding for the Texas Mobility Fund would enhance the effectiveness of this program.

Proposed Remedy Amend state law to redirect any or all of the following existing fees from the General Revenue Fund to the Texas Mobility Fund: motor vehicle certificate of title fees, oversize/overweight vehicle permit fees, motor carrier registration fees, single state motor carrier registration fees, motor carrier proof of insurance fees, salvage dealer license fees, motor vehicle rental tax, excess fines for speeding violations, aviation sales taxes and franchise fees, personalized license plate fees, and motor vehicle sales and use tax.

Amend state law to increase the existing Driving Safety Course Fee from $10 to $40 and dedicate $30 of the fee to the Texas Mobility Fund.

Amend state law to increase existing "2060" weight tolerance permit fees to $2000 and dedicate the increase to the Texas Mobility Fund.

Amend state law to provide that that portion of the existing $30 state traffic fine presently being deposited into the Texas Mobility Fund continues to be deposited to the fund after 2006.

DEPARTMENT'S AUTHORITY OVER ITS BUILDINGS

Background Although there is no specific statutory authority for the Transportation Commission to erect buildings to house its personnel and equipment, there is implied authority to do so in order to carry out the specific powers granted to the commission for furtherance of public road construction and the establishment of a state highway system.

TxDOT's buildings have always been interpreted to be part of the state highway system per a 1953 Attorney General's opinion:

> *The Highway Department has the authority to construct a building on the land owned by it at Camp Hubbard to house its Motor Vehicle Registration Division and personnel from other divisions if such construction is a necessary incident to the furtherance of a public road construction and the establishment of a system of state highways.*

This is also why the Texas Building and Procurement Commission does not construct department buildings, as it does for most agencies.

Historically, a claim concerning a building contract has gone through the same administrative remedies process as a highway claim. Pursuant to Transportation Code, Chapter 223, highway projects bids and contracts claims go to the department Contract Claim Committee, and then to the State Office of Administrative Hearings.

Recently, a surety company who took over a building contract successfully challenged the contract claim process. The Third Circuit Court of Appeals in *State of Texas v. Fidelity and Deposit Co. of Maryland and Colonial American Casualty and Surety Company* held that a building is not a "highway" for purposes of Transportation Code, Chapter 223. This is important because if it is not a "highway" as previously determined by an Attorney General Opinion, then buildings do not fall under the department's bidding statutes. In addition, that takes buildings out of Transportation Code, Section 201.112 which would prevent a building from going through the established department contract claim process.

This ruling has more far-reaching ramifications then a claim being heard by the Contract Claim Committee and then the State Office of Administrative Hearings. If a building is not considered a necessary structure and part of the definition of a highway, then someone could challenge the way the department bids, constructs and maintains buildings.

Proposed Remedy Clarify that a highway under Chapter 223 of the Transportation Code includes a building because department buildings are necessary to the functioning of highways.

PROCEEDS FROM THE SALE OF DEPARTMENT PROPERTY

Background Certain state revenues are constitutionally dedicated to the construction, maintenance, and policing of roads. TxDOT uses these dedicated revenues to purchase a wide array of equipment and other personal property (as opposed to real property) used in the course of highway construction and maintenance and associated administration. From time to time TxDOT must upgrade or replace personal property that is no longer needed. Historically, when state property has been sold, revenues have been returned to the fund or account from which the property had originally been purchased so that the sale of property does not become a method of reallocating expenditures. The 78th Legislature, however, directed in HB 7 and HB 3042 that revenues from all sales of state surplus personal property are to be deposited in the general revenue fund.

Likewise, prior to the 78th Legislature, when TxDOT sold surplus real property such as underused land or buildings, revenues have been returned to the State Highway Fund. HB 2425 authorized the General Land Office (GLO) to sell TxDOT's real property (excluding right-of-way property) it deemed underused and deposit proceeds from the sale to the capital trust fund.

Property purchased with dedicated revenues should not be sold so that the proceeds are diverted to purposes other than those from which the revenues were derived.

TxDOT found it necessary to consider in more detail the legal principles designed to preserve constitutionally dedicated revenues – thus the department requested an Attorney General Opinion. The department's argument was based on the position that proceeds from the sale of surplus personal property originally purchased with revenues constitutionally dedicated to highway purposes could not be deposited in the General Revenue Fund.

In response, the Attorney General, in opinion GA – 0143 dated February 5, 2004 stated:

> *Proceeds from the sale of agency salvage or surplus personal property purchased with funds dedicated to highway purposes by Texas Constitution article VIII, sections 7-a and 7-b are not themselves constitutionally dedicated to highway purposes. Accordingly, proceeds from the sale of agency salvage or surplus property that was purchased with revenues constitutionally dedicated to highway purposes and sold on or after September 1, 2003 may be placed in the general revenue fund.*

Beginning in fiscal year 2004 all sales of surplus personal property were directed to General Revenue. Through 2004 the amount TxDOT deposited to General Revenue in receipts totaled $2,751,317. For the two years prior to fiscal year 2004 the amounts deposited to the state highway fund for these types of receipts was $3,467,861 in 2002 and $2,594,567 in 2003.

The numbers above do not account for surplus personal property receipts the Department of Public Safety (DPS) formerly deposited to the state highway fund. Through 2004, $947,637 was deposited to general revenue - most of this amount would have likely gone to the state highway fund prior to the switch. The two previous years DPS deposited to the state highway fund $2,208,354 in 2002 and $3,157,164 in 2003.

Proposed Remedy Seek legislation to provide that proceeds from the sale of TxDOT and DPS surplus personal and real property originally purchased with State Highway Fund dollars shall be deposited in the State Highway Fund.

CONCURRENT JURISDICTION OF COURTS IN EMINENT DOMAIN

Background Section 21.001 of the Property Code provides that district courts and county courts at law have concurrent jurisdiction in eminent domain cases. Until recently, Sec. 21.013 of the Property Code provided for the filing of condemnation petitions as follows:

> *(b) Except where otherwise provided by law, a party initiating a condemnation proceeding in a county in which there is one or more county courts at law with jurisdiction may file the petition with any clerk authorized to handle filings for that court or courts.*
>
> *(c) A party initiating a condemnation proceeding in a county in which there is not a county court at law must file the condemnation petition with the district clerk.*

These statutes were understood to give condemnors the option of filing in either district courts or county courts at law in the approximately 80 counties where there was a county court at law in existence.

The Property Code was amended to require that eminent domain cases must be filed in the county court at law in all counties where a county court at law exists. Section 21.013(b) was amended by House Bill 1187, 76th Legislature, as follows:

> *(b) Except where otherwise provided by law, a party initiating a condemnation proceeding in a county in which there is one or more county courts at law with jurisdiction shall [~~may~~] file the petition with any clerk authorized to handle such filings for that court or courts.*

According to the bill analysis prepared by the House Research Organization, the purpose of the bill was to require a party initiating a condemnation proceeding to file the petition in a county court at law if such a court existed in the county where the property was located. The bill's supporters took the position that it would alleviate overcrowded district court dockets, and allow the county courts at law to become experts in eminent domain.

In 1985, the Government Code was amended to provide that in Harris County, the county courts at law had exclusive jurisdiction over eminent domain cases. In 1989, the Government Code was again amended to clarify that the county courts at law in Harris County had exclusive jurisdiction over both statutory and inverse eminent domain cases. The general reason given for expanding the jurisdiction of the county courts at law was that the district courts of Harris County were crowded and had a backlog of cases and the county courts at law were not crowded.

County courts at law and most state district courts have concurrent jurisdiction in eminent domain cases. However, condemning authorities are required to file eminent domain petitions with the county clerk in counties that have one or more county courts at law. So while most district courts have jurisdiction over eminent domain cases, these cases must be filed in county courts at law in counties that have them.

The most populated counties in Texas have county courts at law. And most large public improvement projects that are underway or in development are in these populated areas. As a

result, it would be more efficient to allow the district courts, in addition to the county courts at law, to hear eminent domain cases in order to avoid a backlog of cases that delays the delivery of these much-needed projects.

Proposed Remedy In order to establish uniformity throughout the state and to ensure that eminent domain cases are heard as expeditiously as possible, the provision of 21.013 of the Property Code that requires petitioners to file in county civil courts should be amended so that they may also be filed in district courts. And the provisions of Government Code Section 25.1032 that grants exclusive jurisdiction in eminent domain cases to Harris County Courts at Law should be amended so that district courts in Harris County can hear these cases as well.

SECOND LOWEST BIDDER

Background Historically, TxDOT was required to award all highway construction contracts to the lowest bidder. During the late 90s, TxDOT started seeing a number of winning contractors withdrawing their bids after the letting but prior to the award of contracts. The department realized that an efficient way to minimize the number of failed contracts was to be able to award contracts to the second lowest bidder. During the 76th Legislative Session, SB 555 accomplished this goal. The legislation authorized that, in the event the lowest bidder withdrew, the commission could award maintenance contracts up to $100 thousand to the second lowest bidder on one contingency - the second lowest bidder had to accept the unit bid price of the lowest bidder. Although this is an effective tool, the department has seen a number of contracts between $100 thousand and $300 thousand where the lowest bidder withdrew its bid, leaving the department with no choice but to start the bidding process over. As a result, the department has looked for opportunities to streamline this process. One way to do this is to increase the second lowest bidder amount to $300 thousand. Increasing the amount to $300 thousand would be consistent with locally-let maintenance contracts awarded at the district level. Currently, district engineers have the authority to award contracts to the lowest bidder if the amount is not estimated to exceed $300 thousand.

Proposed Remedy Amend Transportation Code, Section 223.0041(b) to authorize the executive director or the director's designee (not below level of assistant executive director) the right to award a maintenance contract to the second lowest bidder and that the dollar amount be raised from $100 thousand to $300 thousand. Amending the statute would accelerate the completion of maintenance contract work and would avoid delay in re-letting contracts. Allowing the department to perform this task instead of the commission would minimize the time between the letting and contract award by several weeks.

MOTOR VEHICLE TEMPORARY TAGS

Background When purchasing a motor vehicle in Texas, dealers issue buyers a temporary cardboard tag that is valid for 21 calendar days from the date of sale. The purpose of the tag is to give temporary registration to the buyer of the vehicle while the dealer applies for title, registration and metal plates. Transportation Code, Section 503.063(e) allows the Texas Department of Transportation to prescribe the specifications and form of temporary tags, but prohibits it from issuing or contracting to issue buyer's temporary tags.

Texas dealers buy the tags directly from printers. There is no accounting for how many tags a dealer issues and there is no provision under the law to compel printers to identify to whom they deliver tags. The tags are not secure in any way as they are easily duplicated and counterfeited. Wide-spread abuse of the tags causes millions of dollars in government revenue losses, contributes to a lack of safety for police officers and facilitates the criminal activity and uninsured motorists.

Proposed Remedy Repeal Transportation Code, Section 503.063(e) so that the department may issue or contract for issuance of secure buyer's tags. Repeal Sections 503.062(d) and 503.0625(e), relating to dealer's and converter's temporary cardboard tags, to impose uniform guidelines for all temporary tags.

COMPETITIVE ENGINEERING CONTRACTING

QUALITY-BASED, BEST VALUE ENGINEERING PROCUREMENT

Background All governmental entities are required to follow the qualifications-based selection procedures of the Professional Services Procurement Act. In the initial selection, value considerations are prohibited under law. Instead, a firm, or provider, is selected based solely on its qualifications, and then the price of the contract is negotiated with that firm to perform whatever professional architectural, engineering or surveying services may be required. If the provider does not agree to a price deemed fair and reasonable, price is negotiated with the second most qualified proposer. This process is not only lengthy, but may not always provide the best value to taxpayers. Price comparisons are prohibited by law. Based on projections by the department, more than $3 billion may be spent over the next ten years without the benefit of examining a second offer.

The market forces that establish the true market value of a given service are substantially diminished when the buyer can only negotiate with one provider at a time and may not return to providers with whom they have previously negotiated. Additionally, competition spurs innovation.

Proposed Remedy The state could achieve efficiencies in time and expense if the Professional Services Procurement Act were amended to provide an alternative method of procuring engineering, architectural and surveying services. The commission does not propose to eliminate qualifications-based selection. However a market-based alternative that incorporates value in addition to qualifications should also be permissible.

Once a list of qualified providers has been determined, then it should be statutorily permissible for the agency to solicit proposals from among the qualified providers to assist in selecting the firm that would provide the best value for the state. It should not be a requirement to simply accept the lowest bid. The agency should be able to consider all factors to ensure a high quality product that is delivered efficiently and that offers the best value.

PRIVATE ENGINEERING AND DESIGN CONTRACTS

Background Current law requires that the department "use private sector engineering-related services to assist in accomplishing its activities in providing transportation projects." The department needs to use private engineering consultants and will continue to do so whether it is a statutory requirement or not. However, the commission does not feel it is appropriate to set arbitrary thresholds that do not correspond to the level of need in any given year.

The level at which the department uses private consultants should be determined by an assessment at the district level of what projects can or cannot be accomplished by state civil engineers. The department would continue its efforts to make expenditures with historically underutilized businesses consistent with applicable law.

Proposed Remedy Repeal Transportation Code, Section 223.041 setting an arbitrary level of expenditures to be paid to private engineering consultants.

LOCAL AUTHORITY TO IMPLEMENT DESIGN-BUILD PROJECTS

Background Current law precludes local governments from using design-build procurement in the delivery of transportation projects. Traditional public sector construction projects can be costly and time-consuming as agencies typically issue a request for proposals to hire an engineering firm to design the project (based on qualifications), and then repeat the process to hire a contractor to build the project (based on competitive bidding). The two-step public procurement process requires considerable management oversight and time, and can lead to miscommunication about design elements, costs, and responsibilities.

A single design-build contract offers: a single-point of responsibility and accountability, team ingenuity, public/private partnerships, access to new technologies, and greater cost and time savings.

Proposed Remedy Amend the Local Government Code to provide an alternative method of project delivery that authorizes municipalities and counties to procure engineering and construction services similar to what is authorized for TxDOT in Transportation Code Section, 361.302 et seq. Local governments would use a competitive procurement process that provides the best value.

AUTHORITY TO ESTABLISH OVERHEAD RATE CEILINGS AND COMPENSATION LIMITS

Background In order to better inform consulting engineers of rates and compensation levels, and to administer the department's engineering procurement process as efficiently as possible, the commission recommends that the department be able to establish overhead rate ceilings and personnel compensation limits. There is no evidence that among the thirteen states currently using such procedures, that these ceilings are onerous. In Texas these rates are currently negotiated on a contract by contract basis.

Proposed Remedy Amend the Professional Services Procurement Act to authorize procuring agencies to establish overhead rate ceilings and personnel compensation limits.

EMPLOYEE RECRUITMENT AND RETENTION INCENTIVES

NIGHT AND WEEKEND SHIFT DIFFERENTIAL

Background According to a recent report by the State Auditor's Office, the average state employee's pay is 17 percent less than their government or private sector counterpart. Due to the nature of the department's business and statewide demands to provide an array of transportation services, there are a number of employees who work night and weekend shifts that are not appropriately compensated. These employees work in areas such as construction, information technology, print plant, reprographic services, security, traffic management centers such as TransGuide, ferryboat operations, and travel information centers. These employees are not compensated for the inconvenience of working non-standard hours on a regular basis.

Proposed Remedy Seek a rider in the Appropriations Bill to authorize the department to pay night and weekend shift differential to employees who work non-standard hours.

Should the department be given this authority, the executive director may authorize the payment of an additional night or weekend shift salary differential not to exceed 15 percent of the monthly pay rate to personnel who work the 3 p.m. to 11 p.m. or the 11 p.m. to 7 a.m. shift or its equivalent. A weekend shift salary differential may not exceed 5 percent of the monthly pay rate that may be paid to persons who work weekend shifts. The evening or night shift salary differential may be paid in addition to the weekend shift salary differential for persons working weekend or night shifts.

This measure would adequately compensate TxDOT employees for working nights and weekends. Night and weekend differential pay would have a positive impact on the department overall and would increase morale and reduce turnover and absenteeism. The measure would also help the department retain more qualified employees and be more competitive in the job market.

B13 REQUIREMENT

Background SB 352 from the 71st Regular Legislative Session required the department to post all positions at or above a Step 1, Group 21 (now B13). This resulted in the department being required to post directors' positions and higher.

HB 1 from the 77th Regular Legislative Session restructured the state salary schedules and classification plan. As a result, the classification plan for directors was modified to begin at B17 and above. Despite the modification, TxDOT is still required to post all positions above the B13 level, regardless of the changes made to the classification plan.

The current requirement is hindering the department's ability to hire employees into critical positions in a timely and efficient manner. With the lifting of this requirement, the department would be able to recruit more qualified employees and expand its Rapid Hire Program (RHP) to positions above the B13 level.

With this change, supervisors could use the RHP to recruit and hire individuals into certain entry-level professional positions designated as being critical to the department. The RHP also eliminates the time required to formally post positions and to evaluate an applicant's knowledge, skills, and abilities. This process

entails a supervisor determining that an applicant meets the minimum requirements for the job, interviewing using pre-approved questions and answers, and hiring if appropriate.

The RHP was recently expanded to include a wide range of lower salaried, entry-level and slightly higher positions. If the law is amended, the RHP could be further expanded to include engineer and information technology professionals in non-supervisory positions between the B13 and B17 levels.

If the statue were amended, the department would continue to post positions between the B13 - B16 level with the exception of those positions that the executive director believes are critical to the department or when time is of the essence based on the justified needs of that particular district, division or office. All positions above the B17 level would continue to be posted to the public.

Proposed Remedy Amend the Transportation Code, Section 201.403 to make optional the requirement to post positions in salary group B13 to B16 and to make mandatory the posting of positions in salary group B17 and above.